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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CABRIOLET PORSCHE + AUDI, INC.,
Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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FEBRUARY 27, 1986

QUESTIONS PRESENTED

1. Does the fact that a Japanese automobile manufacturer may control the number of automobiles it delivers to its wholly owned, exclusive United States distributor insulate the distributor from liability under the federal Automobile Dealers' Day in Court Act ("the Act"), state statute, and its written agreements for the distributor's use of an unwritten allocation system to coerce and intimidate a non-exclusive dealer into establishing an exclusive dealership or selling its franchise under the threat of non-renewal of the franchise agreement?

2. Did the court of appeals overstep its function in reversing the factual determinations that the district court made after hearing conflicting testimony and upon which it based its conclusion

that agents of the defendant automobile distributor had acted to coerce and intimidate the plaintiff automobile dealer in violation of the "good faith" requirement imposed upon the distributor by the Act?

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1985

CABRIOLET PORSCHE+AUDI, INC.,
a Florida Corporation,
d/b/a CABRIOLET HONDA CAR,

Petitioner,

v.

AMERICAN HONDA MOTOR CO., INC.,
a California Corporation,

Respondent.

PETITION

Cabriolet Porsche+Audi, Inc., petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment by which that court reversed a judgment the district court had entered in petitioner's favor.

OPINIONS BELOW

The opinion of the court of appeals is reported as Cabriolet Porsche Audi,

Inc. v. American Honda Motor Co., Inc., 773 F.2d 1193 (11th Cir. 1985), and is set out in the appendix to this petition at A. 1-80. The district court's findings of fact and conclusions of law are not reported, but are set out in the Appendix at A. 81-148.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 15, 1985 (A. 149). On December 18, 1985, the Honorable Lewis F. Powell, Jr., entered an order as Circuit Justice extending the time within which a petition seeking review of that judgment could be filed until February 27, 1986. This petition was filed on that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS

This case involves provisions of the federal Automobile Dealers' Day in

Court Act, 15 U.S.C. §§ 1221-1225 (1982), and of Rule 52(a) of the Federal Rules of Civil Procedure. The relevant provisions of the act and the rule are set out in the appendix at A. 155-61.

STATEMENT OF THE CASE

Nature of the Action

This was an action by an automobile dealer against the wholly owned, domestic distributor of a major foreign automobile manufacturer. In 1978, the dealer had agreed to purchase a non-exclusive dealership for 1.6 million dollars, with $400,000 allocated as the price for the assets and good will associated with the seller's Honda franchise. The sale was conditioned upon obtaining the approval of the distributor. Because the seller had established a miserable reputation as a Honda dealer, the distributor's representatives welcomed the dealer's application

and assured it that it could continue to sell Honda cars on a non-exclusive basis from the seller's facility, at least until its volume increased from a projected minimum of 20-22 cars per month to a volume of 65-75 cars per month. The standard written dealer agreements tendered by the distributor were specific as to a dealer's duties, but vague in defining its rights. The written agreements had only a one-year term.

By spring 1979, the dealer had dramatically reversed the reputation of the dealership. At that time the demand for fuel-efficient cars increased, also dramatically. The distributor's representatives promptly sought to use the leverage created by this demand to sanction the dealer into complying with their demand that it make a substantial additional investment in order to establish a separ-

ate facility for Honda sales and service. Without regard to their prior assurances, they reduced the number of cars delivered to the dealer. They refused to commit to an allocation that the dealer could expect if it complied with their demands.

When the dealer resisted the demands and challenged the conduct of the representatives, the distributor refused to renew the dealer agreements after October 1979. In May 1980, after resisting the distributor's demands for an additional seven months, the dealer sold the assets and good will to a more compliant purchaser for what it had originally paid. The dealer received no compensation for the increase in the value of the franchise resulting from the improved reputation or the change in market conditions.

In the district court, the dealer claimed that the distributor's represent-

atives had never disclosed the existence of an allocation system at any time prior to the purchase or during the period when the market was soft and the available supply exceeded the demand. The dealer also claimed that the system and the manner in which it had been applied to the particular dealer were unreasonable and violated the agreements between the parties.

The dealer claimed that the distributor had acted to coerce and intimidate the dealer through its representatives' attempts to force the dealer to establish a separate facility devoted exclusively to selling and servicing the distributor's cars. According to the dealer, when the distributor was unable to starve the dealer into submission through its application of its alleged allocation system, it refused to renew the dealership agree-

ment in order to compel compliance or force the dealer to sell its franchise. By these acts, the dealer claimed that the distributor had violated the duty to act in good faith imposed by the Federal Automobile Dealers' Day in Court Act (the "Act"), 15 U.S.C. §§ 1221, et seq. (1982) by the applicable state statutes, and by the written agreements.

After a seven-day trial and after considering proposed findings of fact and conclusions of law submitted by each of the parties, the district court significantly revised the dealer's proposed findings and conclusions and adopted them as its own. The district court found that the claimed allocation system had not existed and had never been disclosed to the dealer until after its implementation as a sanctioning device. The court concluded that the system was unreasonable

within the meaning of the parties' agreements and that it had been unfairly applied to the dealer. The court found that the distributor's agents had in fact acted throughout to coerce and intimidate the dealer and, on that basis, concluded that the distributor had violated the duty of good faith imposed upon it by the Act. The court also concluded that the distributor had violated the duties imposed by the applicable state statutes and by the parties' agreements.

The court of appeals reversed. It concluded that the distributor had a "restricted supply" at all times solely because its supply was controlled by its foreign parent. Against that background, the court concluded that both the allocation system and the distributor's use of that system against the dealer were not unreasonable. The court of appeals set

aside as clearly erroneous the district court's factual determination that the distributor had coerced and intimidated the dealer. It directed that judgment be entered for the distributor.

The Material Facts

1. The Parties and the Establishment of Cabriolet's Dealership. Respondent American Honda Motor Co., Inc. ("American Honda") is a California corporation and a wholly owned subsidiary of a Japanese automobile manufacturing corporation, Honda Motor Co., Ltd. ("Japan Honda") (A. 5, 82). American Honda is the exclusive distributor of Honda automobiles in the United States (A. 5, 83). By 1978, American Honda was importing well over 300,000 Honda cars a year and distributing them in the United States (A. 97-98). From September 1978 until May 1980, petitioner Cabriolet Porsche+Audi, Inc.

("Cabriolet") was a Honda dealer (A. 6, 16, 82). Throughout that period, Cabriolet operated what is known as a non-exclusive automobile dealership, that is a dealership that sold and serviced automobiles from a single facility that it had purchased from different manufacturers, or their distributors (A. 6, 81).

In June 1978, Cabriolet agreed to purchase the assets of the De Maria Porsche-Audi-Ferrari-Honda dealership ("De Maria") in Miami, Florida for 1.6 million dollars (A. 6, 85-86). Cabriolet's agreement was conditioned upon its obtaining the approvals that were necessary to enable it to continue to operate a non-exclusive dealership from De Maria's established sales and service facility. (A. 6, 85-86). Four hundred thousand dollars was allocated to the good will represented by De Maria's Honda dealership

(A. 86). Cabriolet promptly sought the necessary approval from American Honda as well as the other manufacturers and distributors that De Maria had represented (A. 6, 87).

During the summer of 1978, American Honda had decided to attempt to make all its dealers in South Florida establish exclusive Honda dealerships, that is establish a separate facility devoted exclusively to the sale and service of Honda automobiles (A. 86-87). American Honda's representatives did not, however, disclose that decision when Cabriolet sought approval to take over De Maria's Honda dealership and to continue to operate on a non-exclusive basis from De Maria's single facility (A.94-95). They welcomed Cabriolet's application because American Honda had become dissatisfied with De Maria's performance (A. 93-95).

Indeed, De Maria had received an extraordinary negative rating in a 1977 customer service image rating survey commissioned by American Honda, a survey that showed that other Honda dealers in the area and throughout the nation uniformly had high positive ratings (A. 85). Against that background, American Honda's representatives promptly approved Cabriolet's application and assured Cabriolet that it could continue to sell and could substantially increase the sales of Honda automobiles from its non-exclusive-dealership facility (A. 93-95).

2. American Honda's Dealer Agreements With Cabriolet. Three aspects of the standarized dealers agreements that American Honda entered into with its dealers are material to the questions presented here. First, American Honda established a Minimum Requirements Plan-

ning Volume for each dealer, specifying the minimum number of Honda automobiles that the parties expected the dealer would sell each year (A. 92). Based upon this minimum volume, American Honda prescribed the minimum working capital, equity, credit-lines, sales personnel, and sales and service space and facilities that the dealer would have to maintain and allocate exclusively to support its Honda dealership (A. 92-93).

Second, American Honda agreed to sell and deliver Honda cars and parts to the dealer and to assist it in developing its franchise (A. 88-90). Third, American Honda reserved the right to ration the number of automobiles a dealer could purchase in the event of shortage or restricted supply (A. 89). Specifically, the standard dealer's agreement provided: "In the event of shortage or restricted

supply, Dealer gives Distributor the right to allocate such supply in any reasonable manner Distributor deems fit in any geographical market area" (id.).

Cabriolet took over the De Maria facility in mid-September 1978 and executed American Honda's standard agreements in October (A. 6-7, 88, 99). Cabriolet's minimum planning volume had been established at 264 Honda automobiles per year, and the agreement required Cabriolet to maintain the minimum financial, facility, and personnel requirements American Honda deemed commensurate with that expected minimum sales volume (A. 92-93). The agreements authorized Cabriolet to act as a Honda dealer for one year, through October 1979 (A. 88).

At the time Cabriolet took over the dealership, the available supply of Honda automobiles exceeded the demand (A. 96).

Cabriolet, however, was initially concerned with the negative customer service image De Maria had established for the facility and concentrated its resources on improving the quality of its services rather than the quantity of its sales (A. 104-05). In that it succeeded: the independent customer survey commissioned by American Honda in 1979 showed Cabriolet as the most highly-rated Honda dealer in the region (id.).

The market for fuel-efficient automobiles changed dramatically as a result of the Arab oil embargo in the spring of 1979 (A. 8, 106). Thereafter, the demand for Honda automobiles exceeded the available supply, and American Honda had to allocate that supply among its dealers (A. 9, 106). American Honda's South Florida representative promptly decided to employ an allocation system during the period of excess

demand to provide leverage to implement its exclusive-dealership policy (A. 86,98 For that reason, both the allocation system allegedly employed and the manner in which American Honda applied it to Cabriolet are material to the questions presented by this petition.

3. American Honda's Allocation System. According to American Honda, it adopted what it styled the "Day's Supply System" to allocate each shipment of cars received from Japan among the dealers in the geographical zone supplied from the port or warehouse at which the cars were received. (A. 10-15; cf. A. 95-99).[1] From each shipment, American Honda deduc-

1. American Honda conceded at trial that its allocation system had never been reduced to written form until after Cabriolet had filed the present suit and had sold its Honda dealership in the face of American Honda's refusal to renew its dealer agreement. At trial American

ted a fifteen percent (15%) "holdback" that the distributor allocated at its discretion (id.). (None of the South Dade Honda dealers knew of this "holdback" until it was disclosed pursuant to the dealer's discovery demands in this suit.) The maximum number of cars that each dealer was entitled to receive was computed using the remaining eighty-five percent (85%) as the base figure (id.).

Honda claimed, however, that its agents had explained the system orally to Cabriolet and other dealers. This Cabriolet denied, and the timing and content of the oral disclosures to the dealers were the subject of conflicting testimony at trial as were the effective dates when American Honda adopted and implemented the system (A. 95-99).

On appeal, American Honda proffered a six-page written description of the allocation system as an addendum to its brief. The court of appeals adopted that statement (A. 11). For purposes of understanding the central concerns raised by the first question presented, however, that statement of the allocation system is sufficient.

According to American Honda, after a shipment had been received, it would select an allocation date and a period of days preceding that date, typically forty-four (44) days (A. 10-15). Based upon the number of warranty cards submitted during the selected period, American Honda would calculate each dealer's daily sales rate and the total daily sales rate for all dealers in the zone. (id.). The total daily sales rate would then be divided into the number of cars in the eighty-five percent (85%) pool available for allocation to determine the number of days that the pool could supply cars for the zone at the daily sales rate established during the designated period prior to the allocation date (id.).

According to American Honda, it would then compute the number of cars each dealer would need for the calculated

period based upon the individual daily sales rate established by that dealer (A. 10-15). From that number, American Honda would deduct the number of cars that the dealer had in inventory on the allocation date (id.). The balance represented the maximum number of cars that the dealer was entitled to receive from that shipment (id.).

The illustration supplied by American Honda with its brief on appeal and adopted by the court of appeals illustrates the alleged system clearly (A. 11-13). The illustration assumes that a shipment of approximately 1176 cars had been received, leaving 1000 (or 85%) as the base pool upon which allocation entitlements were calculated.

> "Thus, if there are a thousand cars available for allocation, and the dealers in the involved area have been selling at a rate of 20 cars per day, the 'warehouse' or 'port' has a

> 50-day supply of cars. A dealer with a travel rate of one car per day and an inventory of 20 cars, i.e., a 20-day supply, will be entitled to 30 additional cars, i.e., the warehouse day's supply of 50 minus the dealer's day's supply of 20 multiplied by the dealer's travel rate."

A. 12-13.

Thus, even under American Honda's version, after the allocation had been made, American Honda would control more than the 176 cars in the fifteen percent (15%) holdback pool. It would also control the twenty additional cars that the hypothetical dealer had held in inventory on the allocation date, plus the total number of cars that other dealers in the zone had held in inventory on that date. These would then constitute the discretionary pool that was available to enable American Honda to implement its exclusive-dealer-

ship and other policies.

4. American Honda's Application of the Allocation System to Cabriolet. At the time Cabriolet purchased the De Maria dealership, American Honda's agents assured Cabriolet that it could and should seek to sell 65 to 75 Honda cars per month from its existing facility (A. 93-95, 101-02). They suggested that when its sales volume reached that level, Cabriolet should consider establishing a separate facility for its Honda dealership (id.). They did not, however, disclose American Honda's recently adopted policy against continued operation of non-exclusive dealerships such as Cabriolet's (A. id., 86-87).[2] It was on this basis that Cabriolet made the investment.

2. According to Cabriolet's officers, they also did not disclose the existence or content of any allocation system at

During its first several months of operation, the period of excess supply, Cabriolet sold slightly more than 20 Honda cars per month, an amount consistent with its planning volume (A. 100-03). Thereafter throughout the period it served as a Honda dealer, it continued to meet the monthly sales objective set for it by American Honda (A. 104). It was not until the period of excess demand, however, that American Honda's agents informed Cabriolet that it was in a "Catch-22" situation and that its only hope of escape lay in establishing a separate facility dedicated exclusively to the sale and service of Honda cars (A. 107-08).

After the oil embargo began, Honda dealers in Dade County, Florida, sold all the Honda cars they received, an average

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that time or at any time prior to the spring 1979 (A. 95-99, 106).

of more than 50 new Honda cars a month (A. 103-04). During this period American Honda delivered an average of 15 Honda cars per month to Cabriolet (A. 102-04). In response to Cabriolet's complaints, American Honda's representatives informed Cabriolet for the first time that an allocation system had been in force during the period of excess supply and that Cabriolet was irretrievably locked into the daily sales rate it had established during the allocation periods that occurred during the first months of its dealership (A. 106-08). They refused to allocate additional cars to Cabriolet so long as it remained a non-exclusive dealer (A. 108). They informed Cabriolet that it could seek an increased allocation from American Honda if and only if it established a separate facility dedicated exclusively to the sale and service of

Honda cars (A. 108-11) and suggested one facility that would have required Cabriolet to invest an additional 450 thousand dollars (A. 115-16). They refused, however, to give Cabriolet any firm commitment concerning the number of additional cars that American Honda would allocate to Cabriolet if it made the substantial investment necessary to establish a separate facility for its Honda dealership (A. 109-10, 111, 115-16).

In July 1979, Cabriolet filed the complaint that instituted the present case. In October, American Honda's representatives recommended against renewal of Cabriolet's dealer agreement (A. 121-22). American Honda did not issue a renewal agreement, but it did continue to deliver a small number of Honda cars each month (A. 122, 102-03). The stalemate ended in May 1980 when

Cabriolet agreed to sell its Honda dealership to Norman Braman for the same price it had paid De Maria (A. 122-23). Thereafter, Cabriolet filed the amended complaint on which the present case was tried.

5. The Conflicting Testimony. The trial in the district court lasted seven days. Cabriolet's principal officers testified as did the individuals who had represented American Honda in its dealings with Cabriolet and other South Florida Honda dealers. Representatives of several other dealers testified concerning their conversations and dealings with American Honda and its same representatives. The district court also admitted substantial documentary evidence. The testimony conflicted in two areas that are material to the questions presented here.

First, Cabriolet's president testified that he was not told that a formal

rationing system existed or that any supply restrictions were in effect when he sought approval for the purchase of De Maria's Honda franchise or at any time during the period of excess supply (A. 93-96, 106-08). This Cabriolet's sales manager confirmed (id.). Moreover, both claimed that the American Honda representatives never disclosed the mechanics of the system or the existence of the fifteen percent (15%) holdback (A. 96-98, 106-08). It was undisputed that American Honda did not disclose its purported allocation system in written form until after the present suit was filed and did not disclose the existence of the "holdback" until discovery was well underway (A. 96-98).

Nonetheless, American Honda's representatives claimed that the system had been in effect throughout and that they

had orally explained it to Cabriolet (A. 34-36). That claim was undermined by the conflicting testimony of representatives of other Honda dealers with respect to the timing and content of the oral disclosures they had received from American Honda's representatives, no two of whom described the same system (A. 96-98). The claim was further undermined by evidence showing that, although all dealers appeared to have received at least as many cars as they would have been entitled to receive under the claimed system, some inexplicably received substantially more even without complying with American Honda's exclusive-distributorship policy (A. 111-15).

The second area of dispute focused upon American Honda's application of its purported allocation system to Cabriolet and its decision not to renew Cabrio-

let's dealership after the first year. Again, Cabriolet's and American Honda's witnesses gave conflicting testimony with respect to their conversations concerning American Honda's demand that Cabriolet make the investment necessary to establish an exclusive Honda dealership and concerning the consequences to Cabriolet if it did not (A. 107-10, 115-22). Again, other dealers testified to their dealings with American Honda during the same period (e.g., A. 112-13). And again the district court received evidence showing the number of cars American Honda had in fact allocated to various competing dealers (e.g., id. and A. 119-20). That court also heard conflicting testimony concerning the negotiations that led to Cabriolet's sale of its unrenewed franchise to Norman Braman and received evidence concerning American Honda's subsequent dealings with

the Braman Honda dealership (A. 121-25).

The Proceedings Below

1. The District Court. The district court found as a matter of fact that American Honda had not implemented or communicated its allocation system at the time it approved Cabriolet as a Honda dealer and issued its dealership agreement or at any time prior to the time that the market reacted to the Arab oil embargo (A. 95-96, 106, 126). The court found that the period between September 1978 and spring 1979 was not a period of "shortage or restricted supply" as Cabriolet should have understood those terms in the written agreements (A. 96, 127). The court found that American Honda's representatives intended to coerce and intimidate Cabriolet by their actions in refusing to allocate cars and in refusing to renew the dealership agreements (A. 115, 126-27). The

court found that as a result of these actions, Cabriolet had been damaged in an amount equal to the net profits it would have otherwise realized from its Honda dealership (A. 132-33).

The district court concluded as a matter of law that American Honda's claimed allocation system as applied to Cabriolet, was not a "reasonable" system within the meaning of its written agreements with Cabriolet; and that American Honda had violated the separate duty of good faith imposed by those agreements (A. 139-41). That court also concluded that American Honda, as a result of its agents' acts, had violated the duty of "good faith" imposed upon it by the Act (A. 143-44, 147) and its duties under Florida statutes (A. 142-45). It entered judgment for damages in the amount it had determined Cabriolet had lost as a result

of those violations. (A. 148, 153-54). Both parties appealed.[3]

2. The Court of Appeals. The court of appeals reversed and remanded the case with instructions that a judgment be entered in favor of American Honda (A. 2-3). That court found as a matter of fact that American Honda's "Day's Supply System" had been in effect throughout and had been orally communicated to Cabriolet by American Honda's representatives (A. 10, 22, 33-41). That court concluded as a matter of law that 1978 was a time of "restricted supply" because at all times the supply of Honda cars available to

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3. American Honda also challenged the district court's assessment of damages on appeal. Cabriolet, supported by the Florida Automobile Dealers Association as amicus curiae, challenged the district court's failure to treble the damages pursuant to Florida's statutory counterpart to the Act. Those issues were not addressed by the court below and are not presented here.

American Honda was subject to the control of its foreign parent, Japan Honda (A. 28-29). The court also concluded the allocation system was "reasonable" within the meaning of American Honda's agreements with Cabriolet (A. 50-51).

The court of appeals found that American Honda's agents had not intended to coerce or intimidate by their demands that Cabriolet establish an exclusive dealership backed by their refusals to allocate cars or to commit to increase the number of cars it would receive if it established a separate facility or by their refusal to renew its dealership agreements after Cabriolet had rejected their demands and challenged their conduct [A. 52-55 (summary)]. That court concluded that none of the challenged conduct violated the several duties of good faith imposed by the Act, by state statute, or

by the agreements (A. 55-80).

REASONS WHY REVIEW SHOULD BE GRANTED

The need for review by this Court stems from the substantial mischief that the decision below is likely to cause in two related areas. First, it is likley to have a substantial and general impact upon the relationships between automobile manufacturers and their dealers. It is also likely to have a specific impact upon the practices of foreign manufacturers and the domestic distributors that will give them an advantage, an unfair one in petitioner's view, over domestic automobile manufacturers. At a minimum, the decision below creates uncertainties in a relationship of major economic significance to the Nation that has been governed by the largely settled jurisprudence that has evolved in the state and federal courts over the last thirty years.

Those uncertainties come at a time when the industry can ill afford them. The dramatic increase in the share of the market that has been captured by foreign automobile manufacturers and the adjustments made necessary in the domestic auto industry as a result of that shift and other changes in the economy have created uncertainties enough.

The decision below will also have a general and specific impact upon the lower federal courts and those who seek relief before them. In the present case, the court of appeals thought itself able to determine from an appellate record the subjective intent of the agents who committed the acts that gave rise to the suit below and substituted its determination for that of the district judge who had heard the conflicting testimony.

The opinion makes it clear that the

court below read Anderson v. City of Bessmer City, 105 S. Ct. 1504 (1985), as requiring a symbolic incantation of a prescribed litany rather than as a decision intended to define substantive limitations necessary to preserve the proper distinctions between the appellate and trial functions. The decision's general impact will be to undermine again the integrity and finality of the trial function and to invite litigants to pursue appeals rather than abide or settle fact-bound cases that come before the federal courts.

The decision will have a specific impact upon automobile dealers. By the Act, Congress created the new federal cause of action because it recognized that an automobile dealer ordinarily did not have the resources to challenge giant automobile manufacturers through tradi-

tional legal or economic means. The decision below will encourage automobile manufacturers and distributors to use their superior resources to pursue litigation in the court of appeals or to force dealers to abandon claims or settle them for less than is due. These consequences are not consistent with the objectives of the Act or with the sound administration of justice in the federal courts. Petitioner develops these points below.

A.

The Court should grant review because the decision below will substantially undermine the rights of automobile dealers and will frustrate the proper enforcement of the separate duties of good faith imposed by federal and state laws in the automobile industry.

1. The Act and Its Purpose. Three fully documented findings motivated Congress to adopt the Act. First, Congress found that the concentration of economic power in the automobile industry had created a "manifest disparity in the ability of franchised dealers ... to bargain with their manufacturers." H.R. Rep No. 2850, 84th Cong., 2d Sess., reprinted in 1956 U.S. Code Cong. & Ad. News 4596-4597.[4]

Second, Congress found the manufacturers had abused this dominant position with respect to their dealers. Id. at

4. See also S. Rep. No. 2073, 84th Cong., 2d Sess. 2 (1956).

4597. Three of the specific abuses that Congress identified are present in this case. Congress was specifically concerned by the manufacturers' use of "'agreements that inadequately define the rights and obligations of the parties ...,'" and reports by dealers that they had been subjected "'... to arbitrary requirements ... to make investments in operating plants or equipment without adequate guaranty as to term of agreement or even supply of merchandise ....'" Id. at 4598.[5] Congress also found that in many instances the manufacturers had used agreements terminable at will or for a short term coupled with the threat of franchise termination or non-renewal to coerce or intimidate their dealers. Id. at 4598, 4599.

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5. quoting from FTC, Report on Motor Vehicle Industry, H. R. Doc. 468, 76th Cong., 1st Sess. 1075 (1939).

Third, based upon a review of then current court decisions, Congress also concluded that dealers had been unable to obtain proper redress for abuses such as these because "[c]onfronted with express provisions in the dealer's franchise, courts have been reluctant to impose a condition of good faith on the part of the manufacturer." Id. at 4599, 4599-4600 (cases discussed).

Congress adopted the Act as a carefully balanced response intended to eliminate these abuses without impairing competition. The Act imposed its duty of "good faith" upon automobile manufacturers and controlled distributors and agents (as well as their franchised dealers), 15 U.S.C. § 1221 (1982). The Act created a new federal cause of action by which an automobile dealer could recover damages caused by "the failure of said automobile

manufacturer. . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer. . . ." Id. at § 1222. To achieve its limited federal objectives, Congress defined "good faith" between automobile manufacturers and dealers as:

> . . . the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

Id. at § 1221 (e).

Here, the district court found that the distributor's representative had given the dealer oral assurances that it could continue and grow as a non-exclusive

dealer in order to induce the dealer to make the substantial investment necessary to purchase an existing non-exclusive dealership that had caused the distributor significant reputation problems. That court found that these representatives had not disclosed the existence of a policy against non-exlusive dealerships or the existence or content of an allocation system that might limit the dealer's ability to grow.

The dealer went forward with the purchase and paid the price, but, when the written agreements arrived, they neither embodied the assurances nor made any further disclosures. The district court found that it was not until seven months later, when according to the distributor it was already too late, that the distributor's representatives first claimed that there had always been an allocation system

in effect and that its application foreclosed growth unless the dealer complied with the distributor's demand and made the substantial additional investment required to establish a separate facility. Even then, these representatives were not willing to give any assurances in writing. Even then they did not disclose the existence of the "15% holdback" or the precise mechanism by which the alleged system operated.

When the application of the newly-disclosed allocation system failed to produce compliance with the demand and instead produced this litigation, the distributor refused to renew the dealer's franchise and placed its continued existence and investment in jeopardy. That actual and implicit threat produced the desired result -- a sale at a bargain price to a dealer willing to establish the

required exclusive dealership facility.

On the facts as found by the district court, the present case presents a textbook illustration of the kinds of practices and abuses that Congress sought to eliminate from the automobile industry when it adopted the Act. The consequences of the decision below must be considered against this backgound.

2. Implementation by the Federal Courts. The federal courts have developed a consistent jurisprudence under the Act. The courts of appeals have regularly upheld findings that a manufacturer or distributor breached the statutory duty of good faith when the specific practices identified by Congress as potentially allusive were present. See e.g., Randy's Studebaker Sales, Inc. v. Nissan Motor Corporation In U.S.A., 533 F.2d 510 (10th Cir. 1976) (substantial curtailment of

supply of new cars); Shor-Line Rambler, Inc. v. American Motor Sales Corp., 543 F.2d 601 (7th Cir. 1976)(arbitrary and unreasonable demands involving acquisiton of new facilities). Autowest, Inc. v. Peugeot Inc., 434 F.2d 556 (2d Cir. 1970) (threat to terminate franchise for failure to follow manufacturer price preference). At the same time, the federal courts have recognized that the duty of good faith imposed by the Act is limited and does not proscribe kinds of conduct that might violate state statutory or common law schemes. See e.g., Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 911 (9th Cir. 1978)(discussing limitations on meaning given "good faith" by the Act).

The courts of appeals had been uniform for thirty years on one point. The presence or absence of coercion, intimi-

dation, or threats of coercion or intimidation is a factual determination to be made based upon the evidence presented to the district court in each case. Prior to this case, the courts of appeals have confined themselves to resolving questions of law and to determining whether sufficient evidence was presented to support a finding that each legally necessary element of the cause of action created by the Act had been proven. Here neither the distributor nor the court of appeals questioned the sufficiency of the evidence presented in this case.

Counsel for petitioner has not found even one decision, prior to the decision below, in which a court of appeals had ruled that determinations made by a district court based upon conflicting testimony were clearly erroneous or, worse still, had proceeded itself to make the

factual determinations necessary to establish that no violation had taken place. That the decision below departs from a jurisprudence that has remained constant for thirty years enhances the need for review by this Court.

3. The Federalism Concerns and The Development of Additional Remedies Under State Law. There are federalism concerns that further enhance the need for review because the decision below tacitly construed the Act as preempting state law concerning the scope of the duty of good faith imposed upon automobile manufacturers by state statutes and decisions. Congress found that prior to 1956, the courts had been reluctant to imply a duty of good faith in otherwise complete written contracts. See, e.g., H.R. Rep. 2850, supra, at 1956 U.S. Cong. Code & Ad. News 4596, 4599-4600 (collecting and

discussing authorities). To remedy that defect in a mercantile relationship of special significance to the economy, Congress adopted a modest definition of the duty of good faith and created a federal cause action for its breach. During the intervening thirty years, however, the states have implemented standards and developed remedies that go well beyond the Act's federal standard and remedy.

The court below adopted the pre-1956 approach that Congress had criticized when it adopted the Act. In so doing, the court eliminated the modest protection from the disparity in bargaining power that Congress sought to guarantee to automobile dealers. But the court did more: It failed to recognize standards of good faith and commercial fair dealing that the state courts have uniformly

implied as part of contracts between merchants. It also failed to implement the special protections the Florida legislature sought to confer upon automobile dealers by adopting its own statutory scheme.

The decision below leaves automobile dealers with fewer protections than other merchants and with fewer protections than they would have today under state law if the Act had never been adopted. In that context, the decision below raises a substantial concern that the court of appeals improperly exercised the federal power to undermine a legitimate exercise of a state's power by the State of Florida.

This Court recently had occasion to address similar concerns in a related context. In New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978), the Court had before it a chal-

lenge to a California statute that provided procedural and substantive protections for automobile dealers that went well beyond any protections contemplated by the Act. The Court explicitly noted that the disparity in bargaining power that had prompted Congress to enact the Act to protect retail car dealers from perceived abusive and oppressive acts by manufacturers had also prompted additional legislative responses from some 25 states, including Florida. Id. at 100-01 nn. 4,5.

There the Court rejected a substantial claim that the state's regulatory scheme should be invalidated because it conflicted with the federal antitrust laws. It acknowledged that federalism required recognition that the states also have a power to engage in economic regulation that is entitled to protection. Id. at

110-11.

The decision below undermines at least three aspects of the statutory scheme that Florida adopted in 1976 to provide enhanced protection for its automobile dealers. Florida prohibits manufacturers from threatening to "not renew" a franchise agreement "unfairly or without due regard to the equities of a motor vehicle dealer, or without just provocation. . . ." Fla. Stat. § 320.64 (7)(1985). Florida sought to implement that protection in two ways. It required that the distributor:

> "notify the motor vehicle dealer and forward a copy of such notice to the department [of Highway Safety and Motor Vehicles] of the licensee's [distributor's] intention . . . to fail to renew the franchise agreement . . . at least ninety days before the effective date thereof, together with the specific grounds for . . . failure to renew. . . ."

Id. at § 320.641(1)(a). It gave dealers

the right to recover treble damages for a distributor's breach of those or any other provisions of the statute. Id. at § 320.697. Moreover, it placed the burden of proof on the distributor to prove that the alleged "violation or unfair practice did not occur" once the dealer had made a prima facie case that a violation had occurred. Id.[6]

The problem with the court's approach

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6. Here the distributor failed to renew the franchise agreement when it expired and failed to notify the department of its failure or the grounds therefore. Here the dealer made a prima facie case that the failure to renew was: unfair; did not take due regard to the dealer's equities; and was done without just provocation. The distributor offered no evidence to show that the violations did not occur. The trial judge found that the violations had occurred and awarded damages, albeit refusing to treble them. The court of appeals reversed. It ruled that the distributor had not failed to renew the franchise agreement because it continued to deliver some cars and, in any event, that the dealer had suffered no damages because he had ultimately sold the dealership.

to construing the contract are similar. The court fragmented parts of the contract and construed every provision in the standardized agreement in favor of the party who drafted it and who had the bargaining power to dictate its terms. That approach is reminiscent of the formalistic approach Congress rejected in 1956. See, e.g., H.R. Rep. No. 2850 at 1956 U.S. Cong. Code & Ad. News 4596, 4599-4600. That approach is not consistent with contemporary jurisprudence or with the approach established by the Florida courts. See, e.g., 11 Fla. Jur.2d §§ 101 et seq., esp. §§ 104 (Reasonable construction), 105 (Just Construction), 106 (Construction against party drafting contract). This Court should grant review because the decision below undermines the role and power of the states as well as frustrating the purposes of the Act.

4. Consequences to Manufacturer-Dealer Relationships in the Automobile Industry. At one level, the potential consequences of the decision below are apparent and demonstrate the need for prompt review by this Court. The manifest disparity in the ability of franchised dealers to bargain with automobile manufacturers that concerned Congress in 1956 remains a fact of life in 1986. Automobile manufacturing remains the province of concerns operating from multi-billion dollar asset bases. Automobile dealerships remain largely the province of small concerns with assets typically amounting to less than one thousandth of those of the manufacturers with whom they must deal.

So too, this case makes clear that the practices that concerned Congress remain common today -- the use of short-term agreements that confer few rights but

impose heavy obligations upon the dealer, leaving the dealer's investments largely dependent upon the good faith of the manufacturer. This is a case that has the hallmarks that Congress thought evidence of abuse -- a good dealer suddenly confronted by a demand for a substantial new investment that was backed by tight restrictions on its supply and a refusal to commit to an increase if the investment were made, followed by non-renewal of the franchise agreement leading to a bargain sale of the dealership to a more compliant buyer.

In that context, the decision below stands as a signal that manufacturers may largely insulate themselves from liability so long as they draft their franchise agreements well and do not leave a paper record proving their actual intent. Given the similarity in the practices employed

here to the practices Congress sought to address by the Act, the decision suggests opportunities that manufacturers are likely to seize and test. This Court should grant review to assure that the standard of good faith applied remains consistent with the purposes and intent of Congress.

At another and more specific level, the decision should command this Court's attention precisely because the automobile market has changed in a way that dramatically enhances the significance of the decision below. In 1956, United States automobile manufacturers were net exporters, and imported foreign automobiles accounted for less than two percent (2%) of the cars sold in the domestic market.[7]

7. U.S. Int'l Trade Comm'n, The U.S. Automotive Industry: U.S. Factory Sales, Retail Sales, Imports, Exports, Apparent Consumption, Suggested Retail Prices, and Trade Balances with Selected Countries for

Between 1978 and 1980, the years at issue in this suit, the percentage of new cars sold that were imported jumped from 26.3% to 35.0%.[8] United States imports of new cars from Japan rose even more dramatically during this period, from slightly less than 1.6 million cars (14%) to more than almost 2.0 million cars (22%) of the domestic market, accounting for well over 50% of the total number of cars imported.[9]

The situation has since changed in a way that bears upon this petition. In 1981, Japan imposed its voluntary export restriction.[10] These artificial res-

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Motor Vehicles, 1964-1984 at 2, USITC Publication 1762 (1985)(comparative tables 1947-1984).

8. Id.

9. Id. at 4.

10. U.S. Int'l Trade Comm'n, Operation of the Trade Agreements Program at 280-82, USITC Publication 1535 (June, 1984) (For a summary of history and effects).

traints reduced and fixed the supply of Japanese cars imported into the United States market at less than 1.9 units per year.[11]

Against that background, two key holdings by the court of appeals have great significance. The court found that the general provisions obligating the distributor to sell and the dealer to buy were meaningless. The court construed the special provision governing the "event of shortage or restricted supply" as controlling. Although the panel recognized that there had been no "shortage" in 1978, it ruled that the distributor always had a "restricted supply" within the meaning of the agreement because the distributor's supply was controlled by its foreign parent. The court ruled that the distributor had the right at all times to adopt

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11. Id. at 281.

and employ allocation systems that increased its dealer's dependence upon the distributor's discretion substantially. The court went on to hold American Honda's so-called "Day's Supply System" was a "reasonable" system, even against the background of this case.

The court thus held that a wholly owned distributor of a foreign automobile manufacturer may adopt an allocation system whose components can be manipulated by the distributor to punish or reward particular dealers (or by dealers with inside information)[12] and that reserves a pool in excess of fifteen (15%) of the total supply for the distributor to allocate (or refuse to allocate) totally at its discretion. That holding should be

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12. In the present case, the selection of the allocation date and of the number of preceding days during which warranty cards received would be counted were the critical variables.

considered in light of the stated policy of Congress that the Act was to be construed to supplement not to undermine the antitrust laws.

That holding takes on added significance because it has come at a time when Japan's voluntary export restrictions have already contravened the underlying policies, if not the letter, of the federal antitrust laws.[13] Petitioner submits that the potential for abuse created by the lower court's concept of "restricted supply" and its approval of the kinds of allocation systems illustrated here makes review necessary not only to preserve the Act's dealer-protection policies but also to assure it does not further insulate

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13. Waller, Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond, 14 Law & Pol'y Int'l Bus. 747 (1982); Note Japanese Car Quotas and Antitrust -- A Reexamination, 15 N.Y.U. J. Int'l L. & Pol. 697 (1983).

anticompetitive policies from attack.

B.

The Court should grant review to correct the appellate court's error in substituting its own credibility determinations for those made by the trial judge because that decision will further increase the costs and risks to dealers seeking the protections Congress sought to provide and because it rebuffed its standards of review this Courts so recently affirmed in Anderson v. City of Bessemer City.

1. The Clear Error. The appellate court's application of the standards for review prescribed by Rule 52(a) of the Federal Rules of Civil Procedure and confirmed in Anderson v. City of Bessemer City, 105 S.Ct. 1504 (1985), makes a mockery of those standards. It reduces them to matters of form that must be publicly acknowledged and lauded, but whose application in reality is a matter committed to the discretion of the courts of appeals. The decision thus undermines the function of the district courts and

permits the court of appeals to cast their judges in the role of magistrates by another name when the occasion moves.[14]

The court of appeals paid lip-service only to the standards. It mischaracterized the decisional process and criticized a judge on the court with the heaviest criminal docket in the Nation for not

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14. The material findings made by the district court were far more unassailable than the findings under review in Anderson. The district judge heard conflicting testimony and received documents over seven days of trial. At the close of the evidence, the court invited each party to submit proposed findings of fact and conclusions of law. Each responded with detailed findings reviewing the testimony and evidence and the conflicting inferences that might be drawn therefrom. The trial judge who heard the testimony reviewed the proposed findings and conclusion. He made significant changes in the dealer's proposed findings and conclusions before he adopted. The changes reduced the amount of plaintiff's recovery by some nine million dollars, erroneously in petitioner's view and in the view of Florida automobile dealers generally. As modified, the court adopted the dealer's proposed findings and conclusions as its own.

taking time to recast the detailed findings in his own words. The court of appeals examined vague self-serving intern reports prepared by the distributor's agents and detailed written explanations prepared for the distributor after the suit was filed. It examined written transcripts of conflicting testimony given during the trial.[15] Based upon that examination, the court of appeals determined that the district judge committed clear error in resolving disputed facts based upon his assessment of the credi-

15. It inferred from self-serving reports written by the distributor's representatives that the district judge had clearly erred in finding the dealer's representatives testimony more credible than theirs. From documents prepared after the suit was filed in 1979, the court of appeals concluded that the district judge had clearly erred in finding on the basis of conflicting testimony that the claimed allocation system had not existed or been properly explained before 1979 and that it had been improperly used as an instrument of coercion thereafter.

bility of the witness he heard during the seven-day trial in light of the other evidence presented. The litany of error is long; but it is the consequences of that error rather the error itself that creates the pressing need for review.

2. The Consequences of the Error. The general consequences of the decision are two. It must undermine the integrity and finality of the trial function and, more importantly, the confidence of litigants in that function. It will reduce respect for the trial courts and increase the incentives to protract fact-bound litigation to where the stakes are high and because there will always be the possibility of reversal on appeal.

The significance of those consequences will be greater for those subject to the Act. The decision will reinforce the disparity in power created by the dispar-

ity in resouces. The costs dealers must incur in seeking the protection Congress sought to provide will be increased. The value of those protections will be diminished. For manufacturers, the incentive to defend their practices through trial and appeal will be increased with an attendent dimunition in the incentive to observe the duty or settle just claims.

The decision, in short, will further undermine the Act by imposing higher costs and risks on the class Congress sought to protect and by reducing the risks and the incentives for compliance for the class whose abuses Congress sought to limit. These consequences, combined with those described above, will render the Act a shield for manufacturers rather than a sword for dealers.

CONCLUSION

This Court has never considered a case

arising under the Act. The previously settled jurisprudence established by the courts of appeals makes that understandable. The decision below, however, represents a dramatic and troubling departure from that established jurisprudence. The potential for mischief is high, and it will work harm in areas that are of considerable importance to both the automotive and the judicial economy. Accordingly, petitioner submits that review should be granted in this case.

Respectfully submitted,

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